APPEAL NO. 93426

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On April 26, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The sole issue to be decided at the CCH was whether Claimant timely reported an injury to her employer. The hearing officer determined that although claimant had not timely reported a neck injury to the employer, claimant had good cause for failure to give notice in a timely manner.

Appellant, carrier herein, contends that the hearing officer's decision was against the great weight and preponderance of the evidence, and requests that we reverse the hearing officer's decision and render a decision in its favor. Respondent, claimant herein, responds that the decision is supported by the evidence and requests that we affirm the decision that good cause existed for any failure to timely report her injury.

DECISION

The decision of the hearing officer is affirmed.

Claimant testified that on (date of injury), she was employed as the employer. She testified that after conducting an orientation class she was entering a building through some large double glass doors carrying a box of papers. Claimant states as she tried to open the door a gust of wind caught the door and jerked her left arm and neck. The incident was witnessed by another of employer's employees. Claimant states she felt some pain and discomfort that day but continued with her work without missing any time from work. At some point claimant states she saw a chiropractor who treated her "for a few weeks" for what claimant believed were neck problems associated with stress. When the "stress" problems did not resolve, the doctor took x-rays and referred her to a medical doctor. Claimant apparently stopped working for the employer on September 25, 1992, and obtained a different position in Amarillo. Eventually claimant was seen by (Dr. V), M.D., on October 23, 1992, who prescribed physical therapy. After seeing Dr. V one time, claimant was seen by (Dr. T), M.D., who officed with Dr. V, and who treated claimant conservatively. Claimant testified when the conservative treatment did not produce results, Dr. T ordered an MRI on November 16, 1992. The MRI demonstrated "a very large C6-7 herniation" as noted in Dr. T's "Re-evaluation" dated November 17, 1992. Claimant testified that after learning she had a herniated disc, which Dr. T told her was from a trauma and was not caused by stress, claimant attempted to notify the employer. Claimant states her initial calls went unanswered but it was agreed that the injury was reported on November 23, 1992. Claimant continues to work and has not missed any time from work.

(Dr. B) is an orthopaedic surgeon to whom claimant was referred by Dr. T. Dr. B, in a report dated January 21, 1993, states claimant is being treated "with conservative care" and that claimant does not want to consider surgery at the present time.

The hearing officer made the following pertinent determinations:

FINDINGS OF FACT

4.On or before October 8, 1992, Claimant did not tell or otherwise notify anyone holding a supervisory or management position with Employer that she claimed a work-related neck injury.

5.Neither Employer nor any person in a supervisory or management position with Employer had actual knowledge of the work-related neck injury claimed by Claimant on or before October 8, 1992.

6.Until mid-November 1992, when Claimant reported her neck injury to Employer, Claimant had a reasonable good faith belief that her neck problems beginning (date of injury), were not related to work.

7.In reporting in mid-November 1992, the injury of (date of injury), to Employer, Claimant exercised the degree of diligence which an ordinary prudent person would have exercised under the same or similar circumstances in that Claimant had a reasonable good faith belief that her neck problems beginning (date of injury), were not related to work.

CONCLUSIONS OF LAW

2.Claimant did not timely report a neck injury to Employer.

3.Under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-5.02 (Vernon Supp. Pamph. 1993), Claimant's failure to notify the Employer until mid November 1992, of the neck injury on September 30, 1992, because she had a reasonable good faith belief that her neck problems beginning (date of injury), were not related to work is good cause for failure to give notice in a timely manner.

Carrier's appeal is primarily based on insufficiency of the evidence predicated on the fact that claimant was a personnel manager and safety director, who handled workers' compensation claims and "was aware that injuries needed to be reported within 30 days." Carrier argues:

If an employee in [Claimant's] position has good cause for failing to report her injury, is (sic) difficult to imagine a situation when any employee would not have good cause for their failure to report their actual injury.

We do not agree.

Carrier emphasizes the provisions of Article 8308-5.01(a) which requires notice to the employer within 30 days after the date of injury. However, Article 8308-5.02(2) clearly modifies the failure to give timely notice when "(2) the commission determines that good cause exists for failure to give notice in a timely manner." Pursuant to that section, the Commission can determine that good cause existed for failure to give notice in a timely manner. The test for the existence of good cause is that of ordinary prudence, that is, whether the claimant prosecuted the claim with that degree of diligence that an ordinary prudent person would have exercised under the same or similar circumstances, which is ordinarily a question of fact to be determined by the trier of facts. Hawkins v. Safety Casualty Co., 146 Tex. 381, 207 S.W.2d 370 (1948). A mistake as to the cause of an injury or disability may constitute good cause. Baca v. Transport Insurance Company, 538 S.W.2d 814 (Tex. Civ. App.-El Paso 1976, writ ref'd n.r.e.); Texas Workers' Compensation Commission Appeal No. 92047, decided March 25, 1992.

Good cause for delay is an issue which may arise both as to notice of injury and filing a claim for compensation. In Hawkins v. Safety Casualty Co., *supra*, the Supreme Court of Texas stated:

> The term `good cause' for not filing a claim for compensation is not defined in the statute, but it has been uniformly held by the courts of this state that the test for its existence is that of ordinary prudence, that is, whether the claimant prosecuted his claim with the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. Consequently, whether he has used the degree of diligence required is ordinarily a question of fact to be determined by the jury or the trier of facts. It may be determined against the claimant as a matter of law only when the evidence, construed most favorably for the claimant, admits no other reasonable conclusion.

Under the 1989 Act, the hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Article 8308-6.34(e). The hearing officer is entitled to believe all or part or none of the testimony of any one witness. Taylor v. Lewis, 553 S.W.2d 153 (Tex. Civ. App.-Amarillo 1977, 1974, writ ref'd n.r.e.). Having reviewed the record in this instant case, we conclude that the hearing officer's conclusion that the claimant had good cause for failure to give timely notice of injury to her employer is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. The claimant's testimony indicates that up until November 16, 1992, she believed her neck pain was caused by stress. It was not until Dr. T told her that her condition was caused by something more than stress, and the MRI revealed a herniated

disc, that claimant knew she had an injury caused by trauma. Upon learning of the herniated disc, claimant took prompt action to inform her (former) employer of her injury and was successful in reporting the injury on November 23, 1992. Carrier, to some extent, recognized that claimant was unaware of the seriousness of her injury when it stated:

> While [Claimant] may not have appreciated the significance of her injury or the relationship of her symptoms to the accident on or about (date of injury). (sic) Under the facts of this case, a finding of good cause is against the greater weight and preponderance of the evidence.

Carrier apparently bases its defense on the proposition that claimant, having been a personnel manager and familiar with workers' compensation, somehow should have known she had a herniated disc, known it was caused by the door jerk and reported the same within 30 days of (date of injury). We do not agree and find that the claimant's lack of knowledge that her injury was work related or lack of belief that her injury was serious, in the absence of medical opinion to the contrary, is sufficient to support the hearing officer's finding of good cause for not reporting the injury within 30 days.

The decision of the hearing officer is affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Lynda H. Nesenholtz
Appeals Judge